

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

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SB 1296

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The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 21. The number who voted opposed to this position was 0.

MEMORANDUM

TO: Michigan House of Representatives Judiciary Committee
FROM: Mark K. Harder, Chair, Probate and Estate Planning Section of the State Bar of Michigan
DATE: December 12, 2012

RE: **S.B. 1296 and House Substitute**

S.B. 1296 establishes a six year statute of repose for claims against lawyers and law firms. This bill was proposed by the Probate and Estate Planning Section of the State Bar of Michigan and has the unanimous support of the members of the governing Council of the Section.

Statutes of repose are somewhat different from statutes of limitations. In the civil context, a statute of limitations sets the time by which a civil claim must be brought and runs from the date a cause of action or right to bring the claim accrues. A statute of repose fixes the period during which a claim may be brought without regard to when the claim accrues.

Statutes of repose and statutes of limitation serve an important public purpose by striking an appropriate balance between the important public policies of ensuring individuals have a period of time during which relief for legitimate injuries may be sought, with the equally important public policy of recognizing that after a certain date claims become "stale" and should not be entertained by the courts. The policy of not entertaining stale claims is important because over long periods of time evidence, including written documents and witnesses, become increasingly unavailable or unreliable to facilitate fact finding by juries and judges.

Michigan statutes presently include both statutes of limitation and statutes of repose. All state licensed professionals are subject to a statute of limitations that requires claims be brought within two years of a claim accruing or six months from discovery of the facts giving rise to the claim, whichever is later. Licensed health care providers, surveyors, architects, engineers, and contractors all benefit from statutes of repose. Although a statute of limitations exists for claims against attorneys, there is no statute of repose for lawyers and law firms similar to those for these other professionals. Members of the Probate and Estate Planning Section seek similar protections as are available to these other professionals.

Contrary to the advice of their estate planning counsel, clients frequently do not periodically revisit their estate plans and a decade or more may pass before clients' wills or trust agreements are put into operation and an alleged error comes to light. In the meantime, memories have become hazy, witnesses are dead or mentally incompetent, and written advice has been lost or destroyed.

Without a statute of repose, there is never a time after which an attorney is free from the risk of malpractice claims and attorneys are forced to maintain expensive "tail"

malpractice coverage indefinitely into retirement. Many members of the Probate and Estate Planning Section are solo practitioners and part of small firms. Maintenance of these tail policies represents a significant cost and burden. The "six months from discovery" provision of the current statute of limitations also leaves attorneys exposed to the possibility of "strike" or nuisance suits and gives plaintiffs leverage to pursue settlements of stale claims.

The Probate and Estate Planning Section assisted with the drafting of the proposed House Substitute and the Section supports adoption of the Substitute. Although members of the legal community support enacting a statute of repose, some individuals raised concerns the Senate passed legislation was ambiguous and might not be construed and applied by the courts as was intended by the drafters. The Section has consulted with other stakeholders in developing the Substitute to resolve the concerns that had been expressed. In the opinion of the Section the Substitute represents an improvement in the Senate passed bill and more clearly achieves the intended goals of the legislation.

In conclusion, the Probate and Estate Planning Section supports enactment of the House Substitute for S.B. 1296 and believes it strikes an appropriate balance between protecting victims of malpractice and the concerns of practitioners that there be finality to the possibility of claims.

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